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No. 91-——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DEKALB BOARD OF REALTORS, INC., and
METROPOLITAN MULTI-LIST, INC.,
Petitioners,

v.

FLETCHER L. THOMPSON and
EMPIRE REAL ESTATE BOARD, INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether a Board of Realtors® violates Section 1 of the Sherman Act, 15 U.S.C. § 1, by requiring licensed brokers to join the Board and subscribe to the Realtor® Code of Ethics as a condition of participation in its wholly owned multiple listing service, when Board membership is available to all licensed brokers on reasonable and non-discriminatory terms and adherence to the Code promotes the efficient operation of the multiple listing service.

PARTIES

The parties to the proceeding below were: DeKalb Board of Realtors®, Inc.;* Metropolitan Multi-List, Inc., d/b/a Metro Listing Service; Fletcher L. Thompson, d/b/a Fletcher L. Thompson Realty; and Empire Real Estate Board, Inc. Petitioner Metropolitan Multi-List, Inc., is a wholly owned subsidiary of petitioner DeKalb Board of Realtors, Inc. Petitioners have no parent company and no subsidiaries (other than wholly owned subsidiaries).

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* The terms "Realtor"® and "Realtors"® are federally registered collective membership marks owned by the National Association of Realtors®.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 934 F.2d 1566, and is included in the Appendix at pp. 1a-30a. The order of the court of appeals denying rehearing is included in the Appendix at pp. 44a-46a. The opinion of the district court granting petitioners' motion for summary judgment is included in the Appendix at pp. 31a-43a.

JURISDICTION

The opinion and judgment of the court of appeals were entered on July 11, 1991. A timely petition for rehearing was denied on September 10, 1991. On November 30, 1991, Justice Kennedy granted an application for an extension of time within which to file this petition to and including January 8, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Sherman Act, 15 U.S.C. § 1, provides in pertinent part that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

STATEMENT OF THE CASE

1. Petitioner DeKalb Board of Realtors, Inc., is a membership association of persons engaged in the real estate business in DeKalb County, Georgia. DeKalb County is located within the Atlanta metropolitan area, adjacent to the city of Atlanta. Like more than 1800 local boards and associations of Realtors across the country, the DeKalb Board of Realtors is a member board of the National Association of Realtors ("NAR") and of its State Association of Realtors.

Membership in the DeKalb Board of Realtors is open to any licensed real estate broker whose principal place of business is within the geographic area served by the DeKalb Board.[1] The basic requirements for Realtor mem-

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[1] The city of Atlanta is served by the Atlanta Board of Realtors. Like the DeKalb Board, the Atlanta Board is a member board of the NAR, but it is not a party to this suit. Realtor membership in the Atlanta Board also is open to all licensed brokers upon application and payment of annual dues, currently $275. Prior to April 1989,

bership are submission of an application and application fee ($20), payment of annual dues ($174.50 per year per licensee), and agreement to subscribe to the Code of Ethics of the NAR.[2]

Petitioner Metropolitan Multi-List, Inc. ("Metro"), is a real estate multiple listing service ("MLS") and a wholly owned subsidiary of the DeKalb Board of Realtors. Metro's participants submit information to Metro about residential properties that are exclusively listed with the participant's firm. They also offer to compensate any other Metro participant who produces a qualified buyer for the property. Metro then makes the residential listing available to all other MLS participants via computer terminals or books published on a biweekly basis. Access to Metro is one of the benefits of membership in either the DeKalb or the Atlanta Board of Realtors. It is available to all members upon payment of a deposit and supplemental MLS fees and charges.[3]

Metro's multiple listing service is similar to that offered by a majority of all local boards of Realtors throughout the United States. The popularity and effectiveness of the multilist approach among both consumers and brokers is reflected in its rapid growth. The first

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the annual membership dues for the Atlanta Board were $363 for a Realtor and $198 for each licensee affiliated with a Realtor member; the Atlanta Board also charged a one-time initiation fee of $500 per member. Defendants' Statement of Uncontested Material Facts ¶¶ 24, 25 ("Statement of Facts"). All references to the Statement of Facts are to paragraphs either admitted as true or not contested in "Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts."

[2] Statement of Facts ¶ 28, Ebert Aff. ¶ 7.

[3] Participants in Metro pay a one-time initiation fee of $1,000 that is nonrefundable, a $500 deposit that is refunded upon withdrawal from the service, monthly dues of $225, and user publishing fees of $2 per listing and $14 biweekly for listing books. Statement of Facts ¶ 31; Ebert Aff. ¶ 8.

multiple listing service was developed in 1907. By 1926, a majority of local boards of Realtors operated a multilist.[4]

As the court of appeals recognized, "multilist services have many pro-competitive effects." Pet. App. 23a. Chief among these is the elimination of "imperfections in the marketplace by increasing the availability of information." *Id.* Specifically, a multiple listing service reduces a buyer's search costs by enabling buyers to gather relevant information about available properties and current price levels from a single MLS-participant's office. Sellers achieve quicker sales because their property is available to be marketed by all participants in the MLS, not merely by the agents of the listing firm. Finally, the MLS makes it easier for newcomers to enter the real estate brokerage business by enabling them to sell the listings of other MLS participants until they can secure a listing inventory of their own.[5]

The court of appeals also recognized that the adoption and enforcement of the Realtor Code of Ethics, and in particular Articles 14 and 21 of the Code, are "reasonable and narrowly tailored" to "the goal of inducing brokers to join the multilist system." *Id.* at 27a. This constitutes a "legitimate procompetitive justification" for requiring adherence to the Code. *Id.* Article 21, for example, prohibits a Realtor from soliciting a listing from the seller/client of another Realtor while an exclusive listing is in effect. This restriction responds to the legitimate concerns of listing brokers that the proprietary information they submit to an MLS about their clients

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[4] FTC Staff Reports, *The Residential Real Estate Brokerage Industry* 86-87 (1983) (hereinafter "FTC Report"); Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 Colum. L. Rev. 1325, 1328-29 & n.30 (1970) (hereinafter "Austin").

[5] *See, e.g.*, FTC Report at 31-32 (explaining "the need for pooled listings"); Austin, 70 Colum. L. Rev. at 1328-29 (1970).

and their clients' property be used only for cooperative purposes and not to solicit the client. *Id.* at 26a.

Article 14 requires Realtors to arbitrate, rather than litigate, business disputes with other Realtors. *Id.* at 27a. Given the extensive interaction among brokers fostered by the MLS, disputes between brokers inevitably arise. The arbitration requirement and the arbitration services provided to Realtors by the local board assure participants that a speedy and inexpensive means is available to them to resolve such disputes.[6] In this way, Article 14 also serves the procompetitive purpose of "inducing brokers to join the multilist system." *Id.*

In sum, the purpose of a multiple listing service is to foster constructive cooperation among brokers.[7] To persuade potential members to join, a multilist service must meet their concerns about the integrity of the service and the need to minimize and resolve disputes. To meet these concerns, the DeKalb Board, like most boards of Realtors, requires participants in its Metro MLS to be members of their local board of Realtors. This requirement assures potential members that all participants will adhere to a uniform set of professional standards and will agree to arbitrate disputes.

2. At the time the complaint was filed, respondent Fletcher L. Thompson was a licensed real estate broker operating his own brokerage firm, Fletcher L. Thompson Realty, in Atlanta. Prior to 1987, Thompson was affiliated with another brokerage firm and was an asso-

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[6] Perhaps the most typical dispute is one over which broker was responsible for procuring a transaction. The amount of money at stake is usually less than $10,000. If members were not required to arbitrate, participants would be forced either to resort to expensive litigation or simply to abandon their claims.

[7] *See* FTC Report at 87 ("A fundamental function of the local Boards has been to bring about . . . 'cooperation' " among brokers).

ciate member of the Atlanta Board of Realtors. Since starting his own practice, he has not applied for membership in the Atlanta Board of Realtors, which serves the area in which his principal place of business is located. He did, however, request access to Metro. Statement of Facts ¶¶ 4, 6; Pet. App. 3a, 32a.

His request was denied with a letter explaining that he needed to join the Atlanta Board of Realtors before he could participate in Metro. It is not disputed that, at the time this lawsuit was filed, Thompson met the qualifications for membership in the Atlanta Board and expected that his application, if submitted, would be accepted. Statement of Facts ¶ 69.

Thompson is a member of respondent Empire Real Estate Board, Inc. ("Empire"). Empire, a predominantly African-American association of licensed real estate agents serving the Atlanta area, was founded in 1939. Empire does not provide its members with a multiple listing service. Empire's annual dues range from $75.00 to $175.00. Statement of Facts ¶ 5; Pet. App. 20a.

3. On December 22, 1988, Thompson and Empire filed this action against petitioners, alleging four antitrust claims (under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2), and three civil rights claims (under the Fair Housing Act, 42 U.S.C. §§ 3604, 3606). Specifically, respondents alleged that petitioners' requirement that real estate agents join their local board of Realtors as a condition of participating in Metro constituted both an illegal tying arrangement (Count 1) and a group boycott (Count 3) in violation of Section 1. Respondents further alleged that the plaintiffs had unlawfully denied respondents access to an "essential facility" (Count 2) and had conspired to create a monopoly (Count 4) in violation of Section 2. Finally, respondents argued that petitioners' membership requirements discriminated against African-American real estate brokers in violation of the Fair Housing Act (Counts 5, 6, 7). Pet. App. 33a-42a.

The district court granted summary judgment for petitioners on all counts.[8] With respect to the boycott and tying claims, the district court held that respondents had failed to introduce sufficient evidence to show that petitioners had market power in a relevant market for participation in multiple listing services. The district court noted that another multiple listing service, First Multiple Listing Service ("FMLS"), also served the same geographic market as Metro and that FMLS did not require its members to join their local board of Realtors. The district court found that the existence of FMLS demonstrated that petitioners lacked market power both because FMLS provided a competitive alternative to Metro and because it "proves that the services can be successfully duplicated and offered on competitive terms." *Id.* at 35a.

Respondents appealed only the antitrust claims. The court of appeals affirmed the judgment on the Section 2 claims. It reinstated, however, both the boycott and the tying claims.

The court of appeals agreed with the district court that, "[a]s a result of the pro-competitive effects inherent in multilist services," the boycott claim must be analyzed under the rule of reason. *Id.* at 23a. But the court reversed the district court's holding that petitioners lack market power. Defining market power not in terms of

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[8] With respect to the Section 2 claims, the district court found both the lack of evidence of market power and the lack of evidence of a specific intent to monopolize each independently dispositive. Pet. App. 41a-42a. With respect to the Fair Housing Act claims, the district court found that respondents had failed to introduce any evidence that petitioners had discriminated against any applicants on the basis of race at any time relevant to this case or that membership terms for African-Americans were different than for others. It held that memories of past discrimination were insufficient today to support such claims. *Id.* at 42a-43a. Indeed, "[at] all times relevant to this lawsuit, the Atlanta Board [of Realtors] has accepted every application for Realtor membership submitted to it." Statement of Facts ¶ 19.

Metro's ability to raise its prices above competitive levels but as "'whether the multilist service has 'sufficient economic importance that exclusion results in the denial of the opportunity to compete effectively on equal terms,'" the court of appeals concluded that "[m]arket power turns on the number of brokers who use the service, the total dollar amount of annual listings, and a comparison of the rate of sales using the multilisting service to the market as a whole." *Id.* at 24a (quoting *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1373 (5th Cir. 1980)).

The court of appeals then instructed the district court that if, under this analysis, it found that petitioners had market power, "it *must find* that the Realtor membership requirements are an illegal group boycott." *Id.* at 28a (emphasis added). The standard for evaluating petitioners' membership requirement was not whether the terms on which membership was offered were reasonable. Rather, the court of appeals held that the dispositive question was whether the requirement of membership was "'reasonably necessary to the accomplishment of . . . legitimate goals and *narrowly tailored* to that end.'" *Id.* at 27a (quoting *Realty Multi-List*, 629 F.2d at 1375) (emphasis added).

Finding this to be "a pure question of law" that was "properly before this Court" (*id.* at 25a), the court of appeals held that "[i]t is clear that the Realtor membership requirements are not narrowly tailored to the goal of inducing brokers to join the multilist system." *Id.* at 27a. According to the court of appeals, "Metro could easily impose its own 'no solicitation' and arbitration rules on its members. Such rules would not constitute a group boycott and would achieve the same ends that Metro claims the Realtor membership requirements achieve." *Id.* at 27a-28a. The court concluded that the board membership requirement must be invalidated upon

a finding of market power as defined by the court. *Id.* at 28a.

As to the tying allegation, the court of appeals held that the board membership requirement was sufficient to support a claim of a *per se* unlawful tie-in under Section 1. Petitioners had argued, *inter alia*, that, because a multilist service cannot exist apart from the rules and regulations that govern its operation, the membership requirement was not a separate product but simply the decision of the DeKalb Board and Metro about the rules and regulations that would govern Metro participants. *Id.* at 13a. The court of appeals disagreed. It relied on evidence in the record supporting the theory that there is a "market for professional affiliation" that "is separate from the market for multilist services." *Id.* at 14a.

The court of appeals also reversed the district court's finding that Metro lacked market power in the market for the tying product (multilist services). Even though respondents conceded "that the physical assets of a multilist service can easily be purchased at costs comparable to those initially paid by Metro," *id.* at 18a, the court of appeals held that petitioners had "built an insurmountable amount of good will" that could, without more, be sufficient to establish market power as a matter of law. *Id.*

Finally, the court of appeals summarized affidavits from individuals who, for various reasons (cost, past history of discrimination, personal preference) would prefer not to join a board of Realtors but still to have access to Metro. The court held that such evidence raised a jury question whether the membership requirement had the effect of "forcing" brokers to purchase a "product" (board membership) that they did not want. *Id.*

REASONS FOR GRANTING THE PETITION

The decision below conflicts with this Court's decisions in *Associated Press* v. *United States*, 326 U.S. 1 (1945), and *Anderson* v. *United States*, 171 U.S. 604 (1898). It also squarely conflicts with numerous decisions of federal and state courts throughout the country which, relying on *Associated Press* and *Anderson*, have rejected boycott and tying challenges to identical board membership requirements. Specifically, the decision conflicts with *Pope* v. *Mississippi Real Estate Comm'n*, 872 F.2d 127, 130-31 (5th Cir. 1989), where the Fifth Circuit held as a matter of law that requiring board membership as a precondition to gaining access to a multilist service does not violate the Sherman Act as long as board membership requirements are reasonable. Four district courts and two state supreme courts also have held that conditioning access to a multilist upon reasonable board membership requirements does not violate the antitrust laws. *E.g.*, *O'Riordan* v. *Long Island Bd. of Realtors, Inc.*, 707 F. Supp. 111 (E.D.N.Y. 1989); *State* v. *Cedar Rapids Bd. of Realtors*, 300 N.W.2d 127 (Iowa 1981). In each of these cases, application of the Eleventh Circuit's "narrowly tailored" standard—a standard several circuits have rejected in rule-of-reason cases—would have led to a different result.

The decision also conflicts with the position taken by the United States Department of Justice in numerous cases and consent decrees involving local boards and multiple listing services. Although the Department of Justice has challenged MLS membership requirements that were unreasonable, see, *e.g.*, *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980), it has never required boards to abandon board membership, per se, as a condition for participation in a competitively significant MLS. See *infra* p. 17 & n.13.

As for the Eleventh Circuit's analysis of the tying claim, it conflicts with the reasoning of the First Circuit in *Wells Real Estate, Inc.* v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988), which upheld a directed verdict against a plaintiff who alleged that the board membership requirement constituted a tying arrangement. Furthermore, the Eleventh Circuit's holding that "good will" can constitute an entry barrier sufficient to establish the market power element of a tying claim conflicts with decisions of the Second and Ninth Circuits rejecting the argument that good will is an entry barrier. *United States* v. *Waste Management, Inc.*, 743 F.2d 976, 984 (2d Cir. 1984); *United States* v. *Syufy Enters.*, 903 F.2d 659, 669 (9th Cir. 1990). And at bottom, the court of appeals' holding that a membership requirement can constitute a *per se* illegal tie-in conflicts with the logic of this Court's decision in *Associated Press* and its progeny that conditioning the availability of services on reasonable membership terms does not violate Section 1.

The decision below also is of national significance. Boards and Associations of Realtors in 49 states require membership in a board as a precondition for participation in board- or association-owned multiple listing services.[9] Under the Eleventh Circuit's decision, most of these boards or associations are potentially engaged in a group boycott as a matter of law and are vulnerable to liability under a *per se* tying theory because most operate a multilist service that has a substantial number of participants and has engendered good will. If allowed to stand, the decision will, in all likelihood, prompt local boards across the country to undertake the expensive task of restructuring their multiple listing services to avoid the antitrust risks posed by the decision. And associations generally will be exposed to antitrust liability whenever

[9] California is the one exception. *See infra* note 12.

they confine valuable association benefits and services to those who elect to join the association, even if association membership is available to all competitors on reasonable and non-discriminatory terms.

Only a decision of this Court can resolve the conflicts among the lower courts and provide definitive guidance to state courts whose antitrust laws are patterned after the Sherman Act. This Court should grant the petition in order to resolve these conflicts and to provide boards of Realtors, multiple listing services, and associations generally with guidance on the fundamental antitrust question whether they may limit valuable services to members as long as their membership requirements are reasonable and nondiscriminatory.

1. The decision below conflicts with this Court's decisions in *Associated Press* v. *United States*, 326 U.S. 1 (1945), and *Anderson* v. *United States*, 171 U.S. 604 (1898). These decisions establish the bedrock principle that an association need not provide services to nonmembers if the association's membership criteria are reasonable and nondiscriminatory.

At issue in *Associated Press* were bylaws that placed significant "obstacles to . . . membership" in the path of any applicant whose newspaper competed with an existing member (326 U.S. at 9-11), and that blocked "nonmembers from any opportunity to buy news from AP or any of its publisher members." *Id.* at 9. A three-judge district court, in an opinion by Judge Learned Hand, held that the obstacles to gaining membership in AP were unreasonably exclusionary and therefore violated the Sherman Act. The court refused, however, independently to strike down those bylaws that prohibited non-members from obtaining news from AP. *United States* v. *Associated Press*, 52 F. Supp. 362, 373-74 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945). Judge Hand explained that the bylaws requiring news organizations to be mem-

bers of AP in order to receive AP news, "taken by themselves, and apart from the restrictions upon membership . . . would be valid." *Id.* at 374. The court therefore enjoined the restrictions on membership only until AP adopted a reasonable and nondiscriminatory membership policy. *Id.*

The government expressly appealed this aspect of the ruling. 326 U.S. at 21-23. This Court, however, affirmed the district court's "refusal to hold each of these [bylaws] a violation of the Sherman Act standing alone," and thus affirmed AP's right to impose reasonable membership requirements as a condition of receiving AP news. *Id.* See also *Anderson*, 171 U.S. at 608-10, 612-14, 618-19 (association of livestock traders whose bylaws prohibited members from trading with non-members and required adherence to ethical rules, but whose membership rules were such that "[e]very one can become a member," did not violate Section 1).

Associated Press has guided the decisions of the Fifth Circuit in *Pope* v. *Mississippi Real Estate Comm'n*, 872 F.2d 127 (5th Cir. 1989), of four federal district courts, and of two State Supreme Courts interpreting state statutes patterned after the Sherman Act. Each of these courts has rejected boycott challenges to a board-membership requirement comparable to the requirement challenged here. The decision below squarely conflicts with each of these decisions.

The plaintiffs in *Pope* were a husband and wife who owned the largest brokerage firm in Monroe County, Mississippi. They resigned their membership in their local board of Realtors in 1981 when their board changed its fee structure to a proportional system that greatly increased their dues. Three years later, after the board had merged with a multiple listing service, the Popes sought and were refused access to that service solely because they did not belong to the board. They sued the

board, alleging that the board membership requirement and fee structure violated Section 1 of the Sherman Act. 872 F.2d at 131.

The district court held that "the real issue presented in the case *sub judice* is not whether the membership requirements are discriminatory . . . but whether simply requiring membership to participate in the MLS violates the 'rule of reason.'" *Pope* v. *Mississippi Real Estate Comm'n*, 695 F. Supp. 253, 271 (N.D. Miss. 1988). After an extensive review of the case law, the district court held that the membership requirement was not unlawful and granted summary judgment for the defendants. *Id.* at 269-72. The court of appeals affirmed. Referring to the earlier Fifth Circuit decision in *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980), the court observed that reasonable membership requirements are not unlawful because, "[i]f properly administered, membership requirements serve pro-competitive purposes." 872 F.2d at 130. Accordingly, "the clear reasonableness of the fee apportionment employed by the board" was dispositive of the Pope's boycott challenge. *Id.* at 130-31.

Had the complaint been filed in Mississippi, Louisiana, or Texas, this case would be at an end because the Fifth Circuit's standards would require dismissal at the summary judgment stage of litigation.[10] Because the complaint was filed in Georgia, however, petitioners now must

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[10] Although the Eleventh Circuit below, like the Fifth Circuit in *Pope*, relied on *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980), *Pope* makes clear that the Eleventh Circuit's reading of *Realty Multi-List* is erroneous. *See Pope* 872 F.2d at 130 (*Realty Multi-List* condemns only unreasonable membership requirements); *see also Pope*, 695 F. Supp. at 271; *O'Riordan* v. *Long Island Bd. of Realtors, Inc.*, 707 F. Supp. 111, 115 (E.D.N.Y. 1989); *compare Realty Multi-List*, 629 F.2d at 1377-78.

proceed to trial. Thus, not only does the legal principle underlying the Eleventh Circuit's holding have significant practical implications that make immediate review appropriate (see *infra* pp. 24-25), but the disparate treatment of similarly situated litigants makes review of the decision below particularly compelling.

No purpose would be served by allowing the issue to percolate further. Lower courts in a variety of states have addressed the antitrust legality of board-membership requirements for participating in multiple listing services. Thus, the issue has been fully ventilated. Moreover, the rule of decision in *Pope* is identical to the rule employed by numerous federal and state courts addressing antitrust challenges to membership requirements for multiple listing services.

For example, in *O'Riordan* v. *Long Island Bd. of Realtors, Inc.*, 707 F. Supp. 111 (E.D.N.Y. 1989), the plaintiff, like respondent Thompson, was a former member of his local board of Realtors who later sued the board when it refused to grant him access to its multiple listing service. The court granted summary judgment to defendants on all of plaintiff's claims, including the claim that "requiring [board] membership as a prerequisite to MLS membership" constituted an "illegal boycott." *Id.* at 115-16. The court's reasoning was identical to that in *Pope*: "Since there is nothing in the record from which a jury could infer that the requirement of [board] membership is unreasonable, plaintiff's claims of illegal boycott and concerted refusal to deal must fail." *Id.* at 116. See also *Brown* v. *Indianapolis Bd. of Realtors*, 1977-1 Trade Cases ¶ 61,435 at 71,613-614 (S.D. Ind. 1977) ("A voluntary business or membership organization may lawfully adopt reasonable standards of membership, and having done so it may thereafter restrict the incidents and advantages and benefits of membership to its members"); *Martin-Trigona* v. *National Ass'n of Realtors*, 1978-1

Trade Cases ¶ 61,915 (E.D. Ill. 1978) (summarily dismissing boycott claim on authority of *Associated Press* and *Brown*); *Murphy* v. *Alpha Realty, Inc.*, 1978-2 Trade Cases ¶ 62,388 at 76,315 (N.D. Ill. 1978) (dismissing boycott claim on basis of *Associated Press*, *Brown*, and *Martin-Trigona*).

The Eleventh Circuit's rule also conflicts with the holdings of two state supreme courts, both of which relied on federal law under the Sherman Act in construing its state antitrust law.[11] In *State* v. *Cedar Rapids Bd. of Realtors*, 300 N.W.2d 127, 128-31 (Iowa 1981), the Supreme Court of Iowa—relying expressly on *Associated Press* and on *Anderson*—held that "[s]o long as Board membership is available to all on a nondiscriminatory basis as this record indicates, we will not compel this private trade association to share one of its membership benefits with brokers who, for whatever personal or business reasons, declined to join." *Id.* at 131.

In *Pomanowski* v. *Monmouth County Bd. of Realtors*, 446 A.2d 83, 87-92 (N.J.), *cert. denied*, 459 U.S. 908 (1982), the New Jersey Supreme Court followed the reasoning in *Cedar Rapids* in rejecting a similar boycott challenge; the court concluded that, even though the defendants had market power, "it is difficult to see any affront to competition" in the absence of any "exclusionary conditions" or "prohibitively high" membership costs. 446 A.2d at 89, 92. Among other state courts, most of which have relied on *Associated Press*, only California has reached a result comparable to the one below.[12]

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[11] These decisions have served in turn as the basis for subsequent federal court decisions. *See, e.g., Pope*, 695 F. Supp. at 270 (finding *Cedar Rapids* "very persuasive"); *O'Riordan*, 707 F. Supp. at 116.

[12] In *Marin County Bd. of Realtors, Inc.* v. *Palsson*, 549 P.2d 833 (Cal. 1976), the California Supreme Court, construing the state's Cartwright Act, appeared to hold that denying non-Board members access to the multilist service was unlawful "in conjunction with" other restrictive rules. *See id.* at 844 n.13. The

The *Associated Press* principle also informed the enforcement policy of the Antitrust Division of the United States Department of Justice when, in the 1970s, the Department pursued a nationwide investigation of the membership rules and practices of real estate boards. The Department's enforcement activities effectively terminated several practices, such as the use of subjective criteria for membership, that had the potential to exclude unfairly otherwise qualified brokers from membership. See, *e.g.*, *Realty Multi-List, Inc.*, 629 F.2d at 1377-87. But the Justice Department has never required that boards make their multiple listing service available to nonmembers. On the contrary, it has required only that, consistent with *Associated Press*, board membership be available to all licensed brokers on reasonable, non-discriminatory terms.[13]

California appellate courts have construed *Palsson* broadly, however, to require that boards make multilist services available to nonmembers. *See, e.g., People* v. *National Ass'n of Realtors*, 174 Cal. Rptr. 728 (Cal. Ct. App. 1981); *Glendale Bd. of Realtors* v. *Hounsell*, 139 Cal. Rptr. 830 (Cal. Ct. App. 1977).

Other state courts have not gone so far. In *Collins* v. *Main Line Bd. of Realtors*, 304 A.2d 493 (Pa.), *cert. denied*, 414 U.S. 979 (1973) and in *Grillo* v. *Board of Realtors*, 219 A.2d 635 (N.J. Super. Ct. Ch. Div. 1966), the Supreme Court of Pennsylvania and a superior court of New Jersey enjoined application of membership requirements that were unreasonably exclusionary or discriminatory; neither court banned the use of reasonable requirements. The remaining state court decisions are consistent with *Cedar Rapids* and *Pomanowski*. *See Grempler* v. *Multiple Listing Bureau, Inc.*, 266 A.2d 1, 7 (Md. 1970); *Blake* v. *H-F Group Multiple Listing Serv.*, 345 N.E.2d 18 (Ill. App. Ct. 1976); *Barrows* v. *Grand Rapids Real Estate Bd.*, 214 N.W.2d 532 (Mich. Ct. App. 1974); *Oates* v. *Eastern Bergen County Multiple Listing Serv., Inc.*, 273 A.2d 795 (N.J. Super. Ct. Ch. Div. 1971).

[13] *See O'Riordan*, 707 F. Supp. at 113 (noting that U.S. Department of Justice had entered consent decree with defendant requiring that membership requirements be reasonable, and that defendant had submitted letters from DOJ confirming that current membership requirements were "considered by the Department to be reasonable and non-discriminatory").

These precedents demonstrate that the court of appeals' fundamental error was in failing to adopt the *Associated Press* test. Under that test, the dispositive question is whether the membership requirements for gaining access to a valuable service are reasonable and nondiscriminatory. If they are, then an antitrust challenge to them should be dismissed.

Here, by contrast, in holding that the membership requirement was not "narrowly tailored" to the legitimate goals it admittedly served (Pet. App. 27a), the court of appeals adopted an insuperable and inappropriate 'least restrictive means' standard. Such an approach is tantamount to *per se* condemnation of the membership requirement. It will always be possible for a court to say that an MLS can operate without a requirement of board membership.

The Eleventh Circuit's analysis is wrong as a matter of fact as well as antitrust law. As a factual matter, it is more efficient for an MLS to use the existing professional standards and arbitration facilities maintained by its parent board of Realtors than to create its own enforcement and arbitration system with the added costs such a redundant system would entail. As a legal matter, the Eleventh Circuit's "least restrictive alternative analysis," while "sometimes used in constitutional law," has no place under the rule of reason: "The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity." *National Football League* v. *North Am. Soccer League*, 459 U.S. 1074, 1079 (1982) (Rehnquist, J., dissenting from denial of cert.); see *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 229 n.11 (D.C. Cir. 1986) ("Once it is clear that restraints can only be intended to enhance efficiency rather than to restrict output, the degree of restraint is a matter of business rather than legal judgment"), *cert. denied*, 479 U.S. 1033 (1987); *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1248-49

(3d Cir. 1975) ("Application of the rigid 'no less restrictive alternative' test in cases such as this one would place an undue burden on the ordinary conduct of business"); *Bruce Drug, Inc.* v. *Hollister Inc.*, 688 F.2d 853, 860 (1st Cir. 1982) ("defendant was not required to adopt the least restrictive means of stopping [plaintiff] from selling abroad, but merely means reasonably suited to that purpose"); Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 8-9 (1984).

In sum, the decision below conflicts with *Associated Press*, *Anderson*, and *Pope*, with the decisions of four district courts and numerous state courts, and with those circuit courts that have rejected the "least restrictive means" standard in applying the rule of reason. This Court should grant certiorari to resolve these conflicts, and in particular to determine whether the Fifth Circuit or the Eleventh Circuit has properly applied the Sherman Act to the lawfulness of requiring board membership as a condition of participation in a multiple listing service.

2. The court of appeals' decision on the respondents' tying claim also conflicts with the decisions of other circuits. Specifically, the court's holding that separate products are involved conflicts with the reasoning of the First Circuit in *Wells Real Estate, Inc.* v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988), and with the decision of the district court in *O'Riordan*, that only a single product is involved. In addition, the court of appeals' holding that good will can constitute an entry barrier sufficient to establish market power squarely conflicts with holdings of the Second and Ninth Circuits. Finally, the court's tying decision conflicts with *Associated Press*, *Pope*, and the other cases just discussed: A restraint that is lawful under the rule of reason when challenged as a boycott ought not become unlawful if the restraint is alternatively labeled a tie-in.

a. The plaintiff in *Wells* refused to apply for membership in his local board because of "principled intransi-

gence." 850 F.2d at 806. He alleged "that the MLS constituted an illegal tying arrangement, wherein access to the listings (the tying product) was impermissibly conditioned on membership in the Board . . . (the tied 'product')." *Id.* The court of appeals affirmed the trial court's entry of a directed verdict on the ground that plaintiff had failed to show that "there was a 'market' at all for real estate board membership." *Id.* at 815 & n. 11.

In explaining its holding, the First Circuit endorsed petitioners' argument below that only one product is involved:

> We are also doubtful whether this situation constitutes a 'tie' of separate 'products' in the first place. . . . The defendant boards are not 'sellers' in the usual sense of the term, but rather a trade organization. The MLS is one of the advantages gained by joining that trade organization [a board of realtors]. . . . Membership brings with it certain responsibilities as well. Whether or not it is subject to challenge on other antitrust grounds, such an arrangement is not a matter of invalid tying.

Id.

The *Wells* analysis was expressly cited by a district court, in stark contrast to the holding below, as an alternative basis for granting summary judgment on a tying claim. *O'Riordan*, 707 F. Supp. at 116-17. The district court explained that tying analysis was inapplicable because "what [the board] and its wholly owned subsidiary, MLSLI, are offering is a single system of marketing real estate. It is a single product and does not fall within the tying analysis." *Id.* at 117. This is precisely the argument rejected by the court of appeals below. Pet. App. 12a-14a & n.6.[14]

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[14] At a minimum, this Court should hold this case pending the decision in *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, No. 90-1029, *cert. granted*, 111 S. Ct. 2823 (1991). In *Eastman Kodak*, the principal issue presented is whether the court of appeals

b. The Eleventh Circuit's tying analysis also conflicts with a second line of cases on the pivotal question of how market power is measured.[15] In this case, the district court found that Metro lacked market power because it had no cost advantage and there were no entry barriers into the market. The Eleventh Circuit reversed, holding that proof that Metro had engendered "good will" was sufficient as a matter of law to establish a barrier to entry.[16] Pet. App. 18a.

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erred in reversing a grant of summary judgment for a defendant equipment manufacturer alleged to have tied the sale of replacement parts to the sale of repair service for its equipment when the manufacturer concededly lacked market power in the market for equipment. Separately raised as the second question presented in the petition is the threshold question whether it is reasonable even to presume that the market for parts and service of equipment is separate from the market for that equipment. Resolution of these questions may well involve reexamination of the standards for identifying separate product markets and may therefore be dispositive of the conflict here.

[15] *See Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 13-18 (1984) (proof of market power in the tying product market is an essential element of any *per se* tying claim); *United States Steel Corp.* v. *Fortner Enters., Inc.*, 429 U.S. 610, 620 (1977) (plaintiff must prove that "seller has some advantage not shared by his competitors in the market for the tying product"); *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F.2d 792, 794-97 (1st Cir. 1988) (discussing "the significant 'market power' requirement of *Jefferson Parish*").

[16] Proof of barriers to entry is essential to a finding of market power because "without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 591 n.15 (1986); *see Will* v. *Comprehensive Accounting Corp.*, 776 F.2d 665, 672 n.3 (7th Cir. 1985) ("Unless barriers to entry prevent rivals from entering the market at the same cost of production, even a very large market share does not establish market power"), *cert. denied*, 475 U.S. 1129 (1986); *International Distrib. Ctrs., Inc.* v. *Walsh Trucking Co.*, 812 F.2d 786, 792 (2d Cir.) ("market share analysis, while essential, is not necessarily determinative" of market power, because factors such as "barriers to entry" must be considered), *cert. denied*, 482 U.S. 915 (1987); *Ball*

This holding squarely conflicts with decisions of two other courts of appeals. In *United States* v. *Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984), the defendant, like petitioners here, argued that a high market share (48.8 percent) was not indicative of market power because defendant had no cost advantage over potential entrants. The plaintiff, like respondents here, argued "that consumers may prefer [defendant's] services, even at a higher price, over those of a new entrant because of its 'proven track record.'" *Id.* at 984. The Second Circuit expressly rejected this argument: "We fail to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition." *Id.*

Similarly, in *United States* v. *Syufy Enters.*, 903 F.2d 659 (9th Cir. 1990), the Ninth Circuit quoted the Second Circuit's analysis in *Waste Management* with approval. The court explained that "an environment where businesses fight it out using the weapon of efficiency and consumer goodwill is what the antitrust laws are meant to champion." *Id.* at 669. The Second and Ninth Circuit decisions reflect the simple economic fact that Metro will quickly lose any good will it has accumulated if Metro engages in monopoly pricing, and it will then be vulnerable to competition from new entrants.[17]

Memorial Hosp., Inc. v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1335-37 (7th Cir. 1986) (because market power "is the ability to control output and prices," lack of entry barriers means "existing market share does not signify power").

[17] The district court's holding that petitioners lack market power—based on the lack of any cost advantage or entry barrier—therefore was clearly correct. *See Will*, 776 F.2d at 673 (tying claim must be rejected absent proof that defendant had "a cost advantage over rivals and potential rivals" or proof of "a barrier to entry"). This is true even without the presence of another competitor (FMLS) in the market. *See United States* v. *Syufy Enters.*, 903 F.2d 659, 668 (9th Cir. 1990) ("But when a producer deters competitors by supplying a better product at a lower price, when he

More broadly, the Eleventh Circuit's market power analysis is inconsistent with the fundamental principle that the antitrust laws exist to protect competition and not competitors. In effect, the court below held that plaintiffs may rely upon the very good will that a successful business engenders in order to force that business to change the way it provides its services. "The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (Hand, J.).

c. Finally, the Eleventh Circuit's conclusion that respondents' membership requirement is prima facie evidence of an unlawful tie-in conflicts with the principles that underlie the "boycott cases"—*Associated Press*, *Pope*, *O'Riordan*, *Cedar Rapids*, and the others—which hold that membership requirements are not unlawful under the rule of reason if membership is available on reasonable and equal terms. It makes no sense to say that a restraint which is lawful when challenged as a boycott under Section 1 suddenly becomes *per se* unlawful once it is labeled a "tying arrangement." In *Jefferson Parish*, this Court noted the fundamental point: "The legality of petitioners' conduct depends on its competitive consequences, not on whether it can be labeled 'tying.'" *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 21 n.34 (1984); see *Smith Machinery Co.* v. *Hesston Corp.*, 878 F.2d 1290, 1295 (10th Cir. 1989) (same), *cert. denied*, 493 U.S. 1073 (1990). Plainly, the United States would not have been entitled to enjoin AP from imposing reasonable membership requirements as a condition of receiving AP news if it had labeled its cause of action "tying" instead of "boycott."

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eschews monopoly profits, when he operates his business so as to meet consumer demand and increase consumer satisfaction, the goals of competition are served, even if no actual competitors see fit to enter the market at a particular time").

The Eleventh Circuit reached a different result in part because it failed to apply correctly the *per se* tying analysis. It erroneously concluded both that two products were involved and that Metro had market power. Here, a finding that membership requirements were reasonable and nondiscriminatory not only would satisfy the *Associated Press* test, but also would confirm that petitioners lacked market power to raise the price of the allegedly tied product (association membership) above competitive levels. See *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F.2d 792, 798 (1st Cir. 1988) (defendants' "ability to extract so small an amount of 'extra' money by itself shows very little [market] power").

But the Eleventh Circuit's analysis also points up a weakness of the *per se* analysis itself—it overlooks legitimate business justifications for the tying arrangement. For example, in *Gonzalez* v. *St. Margaret's House Housing Dev. Fund Corp.*, 880 F.2d 1514 (2d Cir. 1989), the business justifications for the challenged restraint were so compelling that the Second Circuit was "virtually certain that this arrangement would survive scrutiny" under the rule of reason. *Id.* at 1519. It nevertheless reversed the entry of summary judgment for defendant, because while the "facts of this case reveal the . . . weaknesses in the *per se* tying analysis . . . . a majority of the Supreme Court . . . has not abandoned the *per se* test." *Id.* This case thus presents this Court with an opportunity to determine the role that legitimate business justifications should play in a tying analysis, and to consider whether "[t]he time has therefore come to abandon the '*per se*' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have." *Jefferson Parish*, 466 U.S. at 35 (O'Connor, J., joined by then-Chief Justice Burger, then-Justice Rehnquist, and Justice Powell concurring in the result).

3. The practical impact of the Eleventh Circuit's decision extends far beyond this case. The Eleventh Circuit

held, as a matter of law, that the membership requirement is unlawful whenever a multilist service has market power. Virtually all multilist services will have market power as the Eleventh Circuit has defined it, because in most communities there is only one multilist service and in most communities those services have engendered good will.

At a minimum, therefore, the decision below requires local boards throughout Georgia, Florida, and Alabama to abandon their board membership requirement for MLS participation and adopt separate standards of conduct for MLS participants and board members; it also may require them to develop separate mechanisms for enforcing those standards and for arbitrating disputes involving MLS participants and board members. Although these boards could apply the NAR Code of Ethics to all MLS participants whether or not they are board members, creating a separate enforcement and arbitration mechanism is a difficult and expensive task. Moreover, if allowed to stand, the Eleventh Circuit's decision will likely prompt challenges to comparable membership requirements in use throughout the country. Given the costs and uncertainties of defending antitrust litigation, many boards of Realtors may feel compelled to operate less efficient multilist services to avoid becoming enmeshed in such litigation, and these costs may deter smaller boards from offering multilist services at all.

Such an expense should not be imposed on the real estate industry absent any showing that the current way of doing business has any unreasonable exclusionary impact. It is particularly ironic—and inappropriate—that a single private lawsuit, coming a decade after intensive federal government scrutiny had reshaped membership rules nationwide and approved the use of reasonable board membership requirements, could effectively impose such fundamental and costly changes on so many organizations. The question whether the antitrust laws may properly be

used to condemn an association that offers membership to all competitors on reasonable and nondiscriminatory terms but confines its benefits and services to its members is therefore one of national importance that this Court should resolve.

CONCLUSION

The petition for a writ of certiorari should be granted.

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January 8, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 90-8724

FLETCHER L. THOMPSON d/b/a
FLETCHER L. THOMPSON REALTY;
EMPIRE REAL ESTATE BOARD, INC.,
Plaintiffs-Appellants,

v.

METROPOLITAN MULTI-LIST, INC., d/b/a
METRO LISTING SERVICE;
DEKALB BOARD OF REALTORS, INC.,
Defendants-Appellees,

WENDELL WHITE d/b/a EMPIRE REALTY CO. and
E. PEARL PRESLEY d/b/a PAL REALTY CO.,
Intervenors-Plaintiffs.

Appeal from the United States District Court
for the Northern District of Georgia

July 11, 1991

Before JOHNSON and COX, Circuit Judges, and GODBOLD, Senior Circuit Judge.

JOHNSON, Circuit Judge:

This case arises on appeal following the district court's grant of summary judgment in favor of the defendants in this antitrust action.

I. STATEMENT OF THE CASE

A. *Background Facts*

Metropolitan Multi-List, Inc. ("Metro"), one of the defendants-appellees, is a wholly-owned subsidiary of the DeKalb Board of Realtors. Metro is a computerized multilist real estate listing system. A multilist system is a cooperative venture which is used by real estate brokers from various real estate firms who place into the system a list of all the houses that they are attempting to sell. Brokers representing potential buyers look for houses through the multilist, and in the event of a sale they split the resulting commission with the selling broker. Brokers consider the use of a multilist system a necessity.

Metro provides the only multilist service which covers all of Atlanta. While First Multiple competes with Metro on the north side of Atlanta, there is little or no competition on the south side of Atlanta. On the south side of Atlanta, Metro carries the vast majority of listings and is utilized in most of the completed sales, measured both in dollar amounts and in raw numbers. Also, the vast majority of real estate brokers active in the area are members of Metro.

In order to use the Metro multilisting service a broker must become a Realtor. A Realtor is a broker (or a sales associate) who belongs to one of the local branches of the National Association of Realtors. Metro was an independent listing service until the DeKalb Board of Realtors acquired Metro and imposed the Realtor membership requirement upon those who would like to use the listing service.

There are four parties to this dispute. The two defendants are Metro and the DeKalb Board of Realtors; the two plaintiffs are Fletcher Thompson and the Empire Real Estate Board. Fletcher Thompson is a real estate broker who owns his own brokerage firm on the south side of Atlanta. He does not wish to join the Atlanta Board of Realtors.[1] He applied to use the Metro listing service but his application was denied solely because of his failure to join the Realtors. The defendants admit that when he joins the Realtors he will be allowed to use the listing service. The Empire Board was founded in 1939 as an African American professional association because, at that time, the Realtors excluded African Americans from membership. The Empire Board competes with the Board of Realtors and offers similar services, including a code of ethics and arbitration. The Empire Board is a predominantly African American association which services a predominantly African American clientele. Most of its members are located on the south side of Atlanta and most of its members traditionally represent buyers. The Empire Board alleges that, because of Metro's requirement that its members also belong to the Realtors, Empire is losing members. Some firms that otherwise would join the Empire Board cannot afford membership with both the Realtors and the Empire Board.

B. *Procedural History*

Plaintiffs filed their complaint on December 22, 1988, alleging antitrust and Fair Housing Act violations. Wendell White and others moved to intervene in this action, but the motion was denied. Following discovery, the parties filed cross motions for summary judgment. The district court granted defendants' summary judgment mo-

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[1] While Metro is owned by the DeKalb Board of Realtors, Thompson and most of the members of the Empire Real Estate Board would be under the jurisdiction of the Atlanta Board of Realtors if they joined the Realtors.

tion. The plaintiffs brought this timely appeal of the district court's dismissal of the antitrust claims.[2]

II. ANALYSIS

A district court's order granting summary judgment is subject to de novo review by this Court. *See Shipes v. Hanover Ins. Co.*, 884 F.2d 1357 (11th Cir.1989).

A. *Standing*

The question at the heart of standing analysis is whether the particular litigant before the court is entitled to have the court adjudicate the particular claim presented. *See Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). There are two plaintiffs to this action: Empire and Thompson; there are basically three different antitrust claims alleged: an illegal tying arrangement; a conspiracy to monopolize a market; and an illegal group boycott.

1. Empire's Standing to Litigate the Three Claims

Empire is an unincorporated association. As such, it has standing to allege certain injuries suffered directly by the organization, *see id.* at 511, 95 S.Ct. at 2211, and standing to bring certain claims on behalf of its members. *See id.*

Empire has standing to directly bring the tying claim. We have recently held that an antitrust standing analysis involves a two-pronged inquiry into whether the plaintiff has suffered an antitrust injury and whether the plaintiff is an efficient enforcer of the antitrust laws. *See Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th Cir.1991). The "antitrust injury" is satisfied when the plaintiff "plead[s] and prove[s] that the injury [it

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[2] Because the plaintiffs have not specifically appealed the district court's disposition of the Fair Housing Act claims, the plaintiffs have waived any objection to summary judgment on this issue.

has] suffered derives from some anticompetitive conduct and is the type of injury the antitrust laws were intended to prevent." *Id.* at 1450. Empire competes in the market for professional affiliation with the Realtors. Empire claims that it has lost members because the Realtors have entered an illegal tying arrangement with Metro which forces Empire members to drop their affiliation with Empire and join the Realtors. Assuming that Empire can prove these allegations, it has alleged a valid antitrust claim. *See* Section II C, *infra*. Empire is also an efficient enforcer of the antitrust laws because the alleged injury is neither speculative nor indirect. *Todorov*, 921 F.2d at 1451.

Empire has standing to bring a suit on behalf of its members for the conspiracy to monopolize the multilist service market claim. The courts apply slightly different tests to examine when an organization has standing to bring a claim directly and when the organization has standing to bring the claim on behalf of its members. Empire may bring a suit on behalf of its members when:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

United Auto Workers v. Brock, 477 U.S. 274, 282, 106 S.Ct. 2523, 2529, 91 L.Ed.2d 228 (1986). First, Empire's members could bring a suit in their own right for the conspiracy to monopolize the multilist market claim. There is evidence in the record supporting Empire's assertion that nearly 40% of Empire's members also belong to the Realtors and use Metro. It is beyond dispute that, as consumers of the multilisting service, the Empire members may bring an action alleging antitrust violations which force them to pay excessive fees. *See Associated Gen. Contractors v. California State Council of Carpen-*

ters, 459 U.S. 519, 530, 103 S.Ct. 897, 904, 74 L.Ed.2d 723 (1982). Empire is asking for injunctive relief including a request that the court order Metro to eliminate its membership requirements and lower its fees. Both of these requests could be brought by an individual Empire member. Second, the suit is germane to the organization's purpose since Empire is a professional organization which strives to help its members perform as brokers. *Cf. United Auto Workers v. Brock*, 477 U.S. at 286-87, 106 S.Ct. at 2530-31 (discussing the U.A.W.'s purpose). Third, Empire is not seeking monetary damages but only injunctive relief; therefore as the Court noted in *U.A.W. v. Brock*, the association does not need the participation of its members to bring the suit. *Id.* at 287, 106 S.Ct. at 2531.

Empire also has standing to bring a suit on behalf of its members for the group boycott claim. Empire's members could bring a suit in their own right for the group boycott claim. There is evidence in the record that other members of Empire, including Thompson, would like to use Metro's multilist service but are ineligible because of the alleged group boycott. And Empire is asking for injunctive relief that is germane to the organization's purpose and could be brought by the association without the participation of the members.

2. Thompson's Standing to Litigate the Three Claims

Thompson has standing to litigate the tying claim and the group boycott claim. Thompson applied to use Metro's multilist service but his application was denied because he refused to purchase the tied product, membership in the Realtors. Our circuit has recognized, in a related context, that an attempt to enter a market coupled with a showing of preparedness is sufficient to establish an injury in fact, which is one of the bases of standing. *See Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633 (5th Cir.1966). Therefore, in cases such as Thompson's,

a defendant cannot benefit by the application of the standing doctrine from the fact that it is able to prevent the plaintiff from becoming a consumer of its product. As long as the plaintiff made a reasonable attempt to enter the market, our Circuit's case law recognizes that the plaintiff has standing to contest antitrust violations which create barriers to that market. Therefore, Thompson can litigate the validity of the entry barriers which prevented his use of the multilist service. These entry barriers constitute the bases of the tying claim and the group boycott claim. Moreover, the injuries which stem from Metro's ability to prevent Thompson from becoming a multilist service user are antitrust injuries and Thompson would be an efficient enforcer of the antitrust laws because the injuries are suffered directly.

Thompson, however, lacks standing to litigate the conspiracy to monopolize claim. The plaintiffs allege that Metro has conspired to monopolize the multilist market for the southside of Atlanta. The plaintiffs further contend that this alleged monopoly allows Metro to raise its prices and force Metro's users to join the Realtors.[3] The bulk of the antitrust violations from these actions are covered by the tying claim and the group boycott claim, and thus Thompson has standing to challenge them as tying or boycott claims. However, the high user fees are actionable as an entry barrier under the group boycott theory and under the conspiracy to monopolize theory. While Thompson has standing to challenge them to the extent that they constitute an entry barrier, Thompson is presently not a user of Metro and has not been directly affected by the high fees. Therefore, he lacks standing to bring this claim.

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[3] It is important to recognize that Thompson and Empire are not alleging that they are either actual competitors or potential competitors in the market for multilist services. Therefore, they are not alleging that Metro has harmed them by excluding them from the market. They are alleging harm because Metro has raised its prices and because Metro forces its users to join the Realtors.

B. *The Relevant Market*

On a very simplistic level, antitrust law is concerned with abuses of power by private actors in the marketplace. Therefore, before we can reach the larger question of whether Metro violated any of the antitrust laws, we must confront the threshold problem of defining the relevant market. Markets are defined in terms of two separate dimensions: products and geography. Once we have defined the relevant market, we can examine Metro's position within the market, determine Metro's "market power," and thereafter determine whether Metro had enough power within the marketplace to abuse its position.

It is undisputed that the relevant product market is the market for multilist services.[4] The parties, however, strongly dispute the geographic boundaries of that market. The plaintiffs argue that the relevant geographic market is the south side of Atlanta. The defendants argue that the relevant geographic market constitutes all of Atlanta. The district court ruled in favor of the defendants, stating that "[t]he relevant geographic market is not limited to the southside of Atlanta but encompasses the area of effective competition within which the defendants operate [which includes all of Atlanta.]"

The Supreme Court in *United States v. Philadelphia National Bank*, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963), explained that the concept of a geographic market is essentially an economic concept in which the courts should examine "supplier-customer relations." *Id.* at 357, 83 S.Ct. at 1738. The goal is to determine how economic actors function in terms of where buyers seek supplies and sellers seek purchasers. By examining transportation and other transaction costs as well as buyer

[4] As will be discussed below, *see* section II C 1, *infra*, the parties do dispute whether there is a second product market, the market for professional affiliation.

preferences, it is possible to determine if a given area should be viewed as a single market. *Id.* at 358, 83 S.Ct. at 1738. As the Court noted, " 'the area of effective competition in the known line of commerce must be chartered by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies.*' " *Id.* at 359, 83 S.Ct. at 1739 (emphasis in orginal) (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 627, 5 L.Ed.2d 580 (1961)). Courts, when they are defining the contours of a given market, should try to recall that the purpose of this task is to enable the courts to define market power. Thus we are required to exclude irrelevant information about purchasers and sellers who are not part of a market. By erroneously including potential sellers in a market when, in fact, those sellers are not members of that market, a court dilutes the defendant's role in the market and thereby risks erring in its ultimate determination of whether there has been an antitrust violation.

Viewed in light of *Philadelphia National Bank*, the district court's elliptical determination of the geographic market is less than satisfying. The district court's opinion states its conclusion as to the relevant geographic market without explaining how it reached this conclusion. It appears that the district court merely accepted the area in which Metro operates as the relevant geographic market without considering the nature of the "supplier-customer" relationship. The process of defining a geographic market is more difficult when the courts are attempting to define a geographic market for something as intangible as information contained in data banks and conveyed via computers. While it is common to use the term "geographic market" in defining the parameters of a relevant market, it is misleading for courts to confine their analysis solely in geographic terms. The *Philadelphia National Bank* Court focused on the effects of "buyer

preferences" as one of several factors which help define the contours of a given market. While transportation costs and the like may be the primary cause of market barriers which help define the parameters of markets in hard commodities such as steel, *see United States v. Columbia Steel Co.*, 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533 (1948), buyer preferences may be the more important cause of market barriers in intangible markets.[5] In the context of markets which deal in intangibles, the courts should examine transaction costs, transportation costs, and buyer preferences, as *Philadelphia National Bank* commanded, and thereby exclude all those potential sellers, regardless of where they are located, from the analysis of the market when buyers do not "practicably" turn to them for supplies. *Id.*

With this in mind, the district court erred in accepting Atlanta as the relevant geographic market. The parameters of a given market are questions of fact, *see Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560 (11th Cir.1983), and therefore summary judgment is inappropriate if there are material differences of fact. On one hand, the defendant came forward with some evidence that Atlanta is a unitary market. But this was rebutted by the plaintiff who placed into the record considerable evidence suggesting that Atlanta is not a homogeneous real estate market and that real estate brokers specialize in different areas of the city. Moreover, the plaintiffs in this action, Empire and Thompson, specialize in real

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[5] This case is an example of how the process of defining the parameters of the product markets and the geographic markets can be viewed as somewhat interchangeable. *See* Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv.L.Rev. 937, 981 (1981). We could, for example, refer to the product market as those multilist services specializing in the south Atlanta real estate market or we could define the product market as multilist services and the geographic market as the south side of Atlanta. In the end, it makes little difference how one approaches the problem as long as the end result, the definition of the market, is correct.

estate located on the south side of Atlanta. Therefore, the plaintiffs "can practicably turn for supplies" only to those multilist services which include south side listings. It is therefore inappropriate to resolve this dispute on a motion for summary judgment.

C. *The Tying Claim*

The plaintiffs claim that Metro and the DeKalb Board of Realtors have been engaging in an unlawful tying arrangement. The plaintiffs allege that Metro's dominance in the market for multilist services allows it to force brokers into accepting the tied product, membership in the Realtors professional association in order to obtain the tying product, use of the multilist service.

Any alleged antitrust violation may be analyzed under either a *per se* rule or a rule of reason. This Court has held that unless the alleged anti-competitive behavior falls within a few narrow classes, the behavior should be analyzed under the rule of reason. *See United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir.1980). While tying arrangements are one of the classic *per se* forms of anti-competitive behavior, *see Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 608-10, 73 S.Ct. 872, 880-81, 97 L.Ed. 1277 (1953), we have recognized that tying claims can also be analyzed under the rule of reason. *See Tic-X-Press, Inc. v. Omni Promotions Co. of Ga.*, 815 F.2d 1407 (11th Cir.1987). This Court has held that unless the plaintiff is able to show all the elements of a *per se* tying claim, the claim must be analyzed under the rule of reason. *Id.* The four basic elements of a *per se* tying claim are:

> 1) that there are two separate products, a "tying" product and a "tied" product; 2) that those products are in fact "tied" together—that is, the buyer was forced to buy the tied product to get the tying product; 3) that the seller possesses sufficient economic

> power in the tying product market to coerce buyer acceptance of the tied product; and 4) involvement of a "not insubstantial" amount of interstate commerce in the market of the tied product.

Id. at 1414. This Court in *Keener v. Sizzler Family Steak House*, 597 F.2d 453 (5th Cir.1979), added a fifth requirement that the tying company have an economic interest in the tied product.

Metro argued before the district court that summary judgment should be granted in its favor on all five elements of the tying claim. The district court granted summary judgment only on the coercion prong and the economic interest prong. Metro renews its argument for summary judgment on each of the elements of the claim in this Court. We therefore must analyze each element of the tying claim to determine if summary judgment was appropriate.

1. Two Separate Products or Services

Metro argues that there is only one relevant product, the market for multilist services, and that there are not two separate products. Metro concludes that if there are not two separate products there cannot be any illegal tie between them.

In determining whether there are two separate products, we are guided by *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984), which held that two products are separate for tying analysis when there are two separate markets for the product. *Id.* at 21, 104 S.Ct. at 1563. The question of whether a series of transactions or whether a given product constitutes a separate market is a question of fact. *See Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560 (11th Cir.1983). It is undisputed that multilist services constitute one product market. It is hotly disputed, however, whether there is a second,

separate market for professional affiliation. In its analysis, the *Jefferson Parish Hospital* Court examined billing practices, consumer preferences, and the realities of similar markets in its determination that the market for hospitals is separate from the market for anesthesiologists. *Id.* 466 U.S. at 22-23, 104 S.Ct. at 1563-64.

Metro's main argument is that multilist services are useless without the support services provided by the Realtors and that therefore the two services are actually one product. Metro argues that because brokers using a multilist service create various agency and subagency arrangements, they would be hesitant to use these services if they had doubts about the ethics of the other brokers. Metro has placed considerable evidence in the record that the Realtors help reduce uncertainty and other transaction costs by providing a code of ethics and mandatory arbitration. Therefore, according to Metro, brokers utilizing the multilist service have less hesitancy because they know that should another broker use the multilist service unethically and "steal" a sale or a customer the Realtors will efficiently adjudicate the injured broker's complaint. Metro further states that it essentially had a choice and could have structured its operations so that the code of ethics, arbitration, and other support services could have been either a direct part of the multilist service or an indirect part through the Realtors. Metro complains that it should not be penalized for structuring its business one way rather than another. However, both of Metro's arguments are irrelevant to the question of whether the market for professional affiliation is separate from the market for multilist services. Metro does not discuss billing practices, consumer preferences, consumer impressions, the cross-elasticity of the markets, or virtually anything relevant to the definition of whether there are separate markets.[6]

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[6] Metro raises a second argument which is virtually indistinguishable from the first argument. Metro initially argues that a multi-

Metro next argues that there is no market for professional affiliation because an individual who joins the Realtors gains nothing more than a status. Metro's argument can be interpreted in one of two ways. To the extent that Metro is claiming that services are somehow exempt from the antitrust laws, Metro's argument is meritless. *See generally Jefferson Parish Hospital, supra.* On the other hand, if Metro is claiming that the Realtors do not provide services and that by joining the Realtors one merely is gaining a "status," Metro is wrong to think that by calling a "service" a "status" one can actually alter legal relationships. Even if the Realtors offered no services [7] and a broker who joined the Realtors merely gained some added professional status, we would still need to answer the basic question of whether there is a market for this status. If there is not a market for this status, then it is not a separate product.

In the case at hand, all of the relevant evidence submitted on the question of whether there are two separate product markets indicates that the market for professional affiliation is separate from the market for multilist services. For example, there is evidence that the bill for joining the Realtors is separate from Metro's bill; that a broker can join the Realtors and choose not to use the

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list service would be useless without the support services provided by the Realtors. Metro argues in the alternative that multilist services and the Realtors' other services are in fact one product because they function as one product. Such an argument, if it actually is distinct from the first argument, is nonetheless equally irrelevant to the question of whether the markets are in fact separate. Moreover, the *Jefferson Parish Hospital* Court explicitly found that such a functional analysis is irrelevant to the question of whether there are, or are not, separate markets. *Id.* 466 U.S. at 19 n. 30, 104 S.Ct. at 1562 n. 30.

[7] This assertion may come as a surprise to the members of the Realtors who pay several hundred dollars a year for membership and to the DeKalb Board of Realtors official who, in an interrogatory, listed 27 services provided by the Realtors.

multilist service; that, within Atlanta, there are at least two professional groups competing for members; that some local Realtor groups offer multilist services and some do not; that Metro was once an independent organization that was later purchased by the Realtors who imposed the Realtor membership requirement; and that in other markets, multilist services are independent of professional membership, *see* Federal Trade Commission Staff Report, *The Residential Real Estate Brokerage Industry* 116 (1983) (At the time of this report, there were at least 55 multilisting services operating in the United States that were independent of any local Realtor organization). Based on these facts, we conclude that summary judgment in favor of the defendant on this element of the claim would be inappropriate.

2. Market Linkage

The second step in the tying analysis is to determine if the two products are actually tied together. *Tic-X-Press*, 815 F.2d at 1415. The parties agree that a broker may not use Metro's multilisting service without joining the Realtors. Therefore, there is not any actual dispute over whether the markets are tied.[8]

3. Economic Coercion

One of the bases of the district court's grant of summary judgment was its conclusion that the plaintiffs failed to produce sufficient evidence that Metro had enough

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[8] The Court in *Tic-X-Press* required the plaintiffs to prove both tying and coercion to satisfy this element and to prove market power and coercion to satisfy the third element of tying analysis. We have chosen to reformulate the test to simplify the analysis. Under this reformulation, plaintiffs must prove that the products were tied and then, for the third element, plaintiffs must prove that the defendants have sufficient market power to coerce buyers. Therefore, a plaintiff must prove coercion only once. This reformulation has no substantive effect other than bringing some analytical clarity to an otherwise murky area.

economic power due to its multilisting service to coerce brokers into joining the Realtors. In order to prove the economic coercion prong of the tying analysis, the plaintiffs must prove both that Metro has "sufficient market power," *Tic-X-Press*, 815 F.2d at 1420, within the tying market and that Metro has wielded its market power to force brokers to "buy a product that [they do] not want or would have preferred to buy elsewhere on other terms." *Id.* at 1416.

The plaintiffs first must prove that Metro has sufficient market power within the relevant product market to coerce brokers into choosing the Realtors as their professional association if Metro so desires. We have already concluded that there is a material question of fact whether the tying market is that portion of multilisting services which contains listings on the south side of Atlanta or that portion of multilisting services which contains listings in Atlanta. Thus, this case needs to be remanded for this initial determination. On remand the district court should then use this definition of the relevant market to determine whether the plaintiffs have proven market power.

Metro argues that regardless of which set of boundaries defines the market, summary judgment is warranted because it lacks the requisite market power. In *Tic-X-Press*, this Court stated that market power "can be sufficient even though the seller does not dominate the market . . . Economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." *Id.* at 1420. The Supreme Court in *U.S. Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977) (*Fortner II*), stated, "the question is whether the seller has some advantage not shared by his competitors in the market for the tying product." *Id.* at 620, 97 S.Ct. at 867. The *Fortner II* Court gave examples of legal barriers (such as patents and copyrights), physical barriers (such as uniquely lo-

cated land), and economic barriers (such as cost advantages), in the tying market. *Id.* at 621, 97 S.Ct. at 868. The *Tic-X-Press* Court added to this list the example of those sellers who benefit from the insulating effect of substantial entry barriers into the tying product market. *Tic-X-Press*, 815 F.2d at 1420.

The district court held that the plaintiffs have not demonstrated sufficient market power. There are two dimensions to its ruling. First, the district court held that there is no evidence in the record of "the defendant's ability to force brokers to" alter their choice of professional associations. Second, the district court held that Metro has no "cost advantage . . . that cannot be duplicated." And, therefore, other groups could start a competing multilist system and challenge the defendant's market power.

Metro claims that it does not have any disproportionate market power because other multilist systems compete with it and brokers can use alternatives to multilist systems. Metro claims that an individual who does not want to join the Realtors but nonetheless wants to use a multilist system could join First Multiple. And Metro claims that brokers could use other methods of determining what properties are for sale. Assuming, however, that the market is defined as those multilist systems with listings on the south side of Atlanta, there is evidence in the record that First Multiple is not a part of that market. While First Multiple may in fact compete with Metro in Cobb County and the north portion of Fulton County, there is evidence in the record that First Multiple has few listings on the south side of Atlanta. As for the south side of Atlanta, the record reflects that Metro has no competition except for an occasional listing by First Multiple. Moreover, there is considerable evidence in the record that multilist services are a necessity for brokers. There are several affidavits and depositions which state that it is difficult to survive as a broker without the

use of a multilist service. Finally, there is considerable evidence placed into the record that the multilist market has a very low cross-elasticity. For example, there is evidence that the only alternatives to a multilist system are poor substitutes: plaintiff Thompson spoke at length in his deposition that without a multilist system he spends hours every day driving around taking notes on houses for sale, that this method is costly, extremely inefficient, and not very timely; there is also evidence that a non-computerized multilist system has been attempted by Empire but failed because it was not timely enough and that published magazines also are a poor substitute.

As for the second basis of the district court's holding, Metro claims that the district court was correct that there are no high barriers to entering the multilisting service market. Metro notes that the physical assets can be cheaply purchased. While the plaintiffs agree with Metro that the physical assets of a multilist service can easily be purchased at costs comparable to those initially paid by Metro, the plaintiffs contend that there are other barriers to competition in the multilisting service market. The plaintiffs argue that they have met their burden of production by placing into the record proof that a new multilist service needs to build a substantial number of listings before it can become useful. The plaintiffs argue that Metro has built an insurmountable amount of good will and the plaintiffs point out that an individual attempted to compete with Metro and that for a variety of reasons, including this good will barrier, his effort failed. Under *Tic-X-Press*, *supra*, such a barrier would be sufficient to establish market power.

In short, there is a material issue of fact as to whether the defendants have the necessary market power. There is evidence in the record suggesting that multilist systems are necessary, that there are few realistic substitutes, that there are entry barriers to the market, and that Metro may not have any competitors.

To satisfy the coercion element of the claim, the plaintiffs need to show that Metro not only has this market power but also has wielded this market power to force brokers to alter their choice of professional associations. Metro denies wielding its market power and contends that there is no evidence in the record supporting this claim. However, it is undisputed that Metro requires brokers to join the Realtors. There also is evidence in the record stating that the expense of dual membership in trade groups can be prohibitive for some brokers, and that 400 of Empire's prospective and current members did not join Empire or quit Empire because of the prohibitive cost.[9] The record also contains the following affidavits: three affidavits stating that the individuals were members of the Realtors and of Empire and that they wanted to quit the Realtors but could not because Metro was too important to their business; three affidavits from Empire members stating that they would like to use Metro but they could not afford membership both in the Realtors and in Empire; seven affidavits from Realtor members who wanted to quit the Realtors and join Empire but could not afford either to lose their access to Metro or to pay a second set of dues for membership in a professional association; and one affidavit from an Empire member who would like to use Metro, evidently can afford membership in both the Realtors and Empire, but dislikes the Realtors because of their past history of discriminating against African Americans. Under *Tic-X-Press*, it is

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[9] Metro dismisses Empire's affidavit about lost members as "conclusory, self-serving and factually unsupported." As for Metro's claim that the affidavit is self-serving, we would be surprised if any party ever submitted an affidavit that was not self-serving. Moreover, this attack on the credibility of the witness is inappropriate during a motion for summary judgment. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). As for Metro's claim that the affidavit was factually unsupported, the affiant was an officer of Empire who spoke about her personal knowledge of the membership.

clear that summary judgment is inappropriate on the question of whether there was any actual coercion. *See Tic-X-Press*, 815 F.2d at 1417 (one example is enough to demonstate coercion).

4. "Not Insubstantial" Effect on Interstate Commerce

The plaintiffs also claim that they have demonstrated that the tie had more than an insubstantial effect on interstate commerce. The Supreme Court in *Fortner Enterprises v. United States Steel (Fortner I)*, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969), held that the dollar volume in the tied market (in this case, the market for professional affiliation) affected by the alleged antitrust violation must be more than "*de minimis*" to comply with the "not insubstantial" standard. *Id.* at 501, 89 S.Ct. at 1257. Moreover, the gross dollar amounts need not be compared to the overall market to meet this standard. *Id.* This Court has held that $325.00 is insubstantial, *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486 (11th Cir.1985), and that $10,091.07 is not insubstantial. *Tic-X-Press*, 815 F.2d at 1419.

The question therefore is whether this illegal tie has a "not insubstantial" effect on commerce in the tied market. The plaintiffs claim there is sufficient evidence in the record to support this element of the claim. There is evidence that Empire has lost close to 400 members due to this allegedly illegal tying arrangement.[10] There is also evidence that Empire charges $75.00—175.00 in annual dues. The loss of just one year's dues from these

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[10] The plaintiffs also claim that the dollar amounts are substantial because there is support in the record that Thompson and others have lost thousands of dollars in lost sales due to their lack of access to a multilisting service. However this loss is not a loss within the tied market because the tied market is the market for professional affiliation.

members results in a loss of between $30,000.00—70,000.00 which is clearly substantial.[11]

5. The Economic Interest Question

The district court also granted summary judgment because the plaintiffs failed to show that Metro had an economic interest in the Atlanta Board of Realtors. The Realtors are structured like many organizations; all the local chapters of the Realtors belong to a state organization and each of the state organizations belongs to the national organization. Among the several local Realtor organizations in the greater Atlanta area are the Atlanta and DeKalb Board of Realtors. While Metro is wholly owned by the DeKalb Board of Realtors, Thompson and most, if not all, of Empire's members are within the jurisdiction of the Atlanta Board of Realtors and would have to join that Realtor association to use Metro.

The economic interest standard has been applied three times in this Circuit. *Midwestern Waffles, Inc. v. Waffle House*, 734 F.2d 705, 712 (11th Cir.1984); *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453 (5th Cir. 1979); and *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 377 (5th Cir.1977). In each of these cases, the plaintiffs were franchisees challenging a franchisor's detailed rules specifying which products could be sold at the franchise, and in each of these cases, the franchisor had absolutely no financial interest in the products. The court in *Keener* stated that a tying claim fails when the "company has absolutely no interest in the sales of a third company whose products are favored by the tie-in." *Keener*, 597 F.2d at 456. The plaintiffs imply that we should limit the economic interest prong to franchise cases. Although this standard has been applied only in franchise cases and the need for this rule appears

[11] The plaintiffs could also prove a not insubstantial effect on the tying market by determining how much money the Realtors make from brokers who join the Realtors solely in order to use the multilisting service.

to be best suited to such cases, we do not need to limit this economic interest prong to situations involving franchises,[12] because there is evidence in the record to support a finding that there was a sufficient economic interest.

We cannot say that Metro has "absolutely no interest" in the size of the Atlanta Board of Realtors. Because of the close nature of the relationships between all the Realtor organizations, Metro is benefited and therefore has an interest in having Thompson and the other Empire members join the Atlanta Board of Realtors. While Metro is owned by the DeKalb Board of Realtors, both the DeKalb and the Atlanta Boards belong to the Georgia and National Boards of Realtors. Moreover, a portion of every dollar paid to the local board is paid to the state and national boards. There is evidence in the record showing that the state and national boards then use the money to perform various services for the local boards. In an interrogatory, the DeKalb Board of Realtors listed nineteen benefits received from the Georgia Association of Realtors and seventeen benefits received from the National Association of Realtors. Moreover, the plaintiffs submitted an affidavit from an individual who attended a Georgia Association of Realtors meeting in which the group voted to send up to $15,000 to the DeKalb board to help in the defense of this action. Therefore, there is sufficient evidence in the record for us to conclude that Metro has something more than "absolutely no interest" in the size of the Atlanta Board of Realtors.

In conclusion, it appears that the plaintiffs have placed into the record sufficient evidence alleging the five prima facie elements of a per se tying violation.

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[12] Arguably, though, the economic interest prong has already been implicitly limited to franchise cases since the economic interest prong has been ignored in nonfranchise cases. *See Tic-X-Press, supra.* This prong has also been criticized by other courts. *See Gonzalez v. St. Margaret's House Housing Development Fund Corp.*, 880 F.2d 1514 (2d Cir.1989).

D. *The Group Boycott Claim*

The plaintiffs also complain about the restrictive membership policies adopted by Metro. The plaintiffs complain that Metro's requirement that its members belong to the Realtors violates the antitrust prohibition on group boycotts. Far from writing on a blank slate, we are faced with a considerable body of precedent explaining the group boycott effects of a Georgia-based multilist service's membership requirements. In the comprehensive opinion of *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir.1980), we noted that multilist services have many pro-competitive effects. Most importantly, multilist services help eliminate imperfections in the marketplace by increasing the availability of information. *Id.* at 1368. As a result of the pro-competitive effects inherent in multilist services, this Court recognized that it could not, as a matter of law, condemn the multilist service's membership criteria as a *per se* violation of the antitrust laws. *Id.* at 1369. The plaintiffs do not contest this application of *Realty Multi-List* to the case at hand. Following *Realty Multi-List*, we therefore hold that Metro's membership requirements are not *per se* antitrust violations.

The *Realty Multi-List* court, however, held that the membership requirements for a multilist organization can, under a rule of reason analysis, violate the antitrust laws. The *Realty Multi-List* court noted the significant economic harm that multilist services cause when they exclude brokers from their service. *Id.* at 1370-71. First, the excluded broker's listings will not be distributed as widely as possible, resulting in inefficient sales prices. Second, the exclusion reduces the competition among brokers and could result in less competition for brokerage fees. *Id.*; *See also* Federal Trade Commission Staff Report, *The Residential Real Estate Brokerage Industry* 151-55 (1983) (finding that discount brokers tend not to be members, for whatever reason, of multilisting services).

"Thus where a broker is excluded from a multiple listing service without an adequate justification in the competitive needs of the service, both the broker and the public are clearly harmed. [I]n these circumstances, the exclusion from the association will be found to violate Section 1 [of the Sherman Act]." *Realty Multi-List*, 629 F.2d at 1371 (emphasis added). Therefore, in order to determine whether summary judgment was warranted we must first determine whether Metro has the requisite market power, and second we must examine whether Metro has any justification in terms of fostering competitiveness for its entry requirements.

1. Market Power

The district court granted summary judgment on the threshold question of market power. The district court noted that *Realty Multi-List* required an initial determination of whether the service has sufficient market power to justify this heightened scrutiny of its membership requirements. The rationale adopted by *Realty Multi-List* was that powerful market forces, essential to the economic survival of a competitor, must be open to all competitors. The question of market power is a factual one. *Id.* at 1373. In *Realty Multi-List*, we defined market power as a question of whether the multilist service has "'sufficient economic importance that exclusion results in the denial of the opportunity to compete *effectively* on equal terms.'" *Id.* at 1373 (emphasis in the original) (quoting Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 Colum.L.Rev. 1325, 1346 (1970)). Market power turns on the number of brokers who use the service, the total dollar amount of annual listings, and a comparison of the rate of sales using the multilisting service to the market as a whole. *Realty Multi-List*, 629 F.2d at 1373-74. It is important to note that the Court in *Realty Multi-List* assumed that testimony stating that the multilist system was used by

the vast majority of brokers in the relevant geographic market and that it was very important to the economic survival of a brokerage was sufficient to constitute the requisite market power. *Id.* at 1374.

In the case at bar, the district court erroneously granted summary judgment on the market power issue. The court first erred by defining the relevant market as all of Atlanta when, at the very least, there is a material difference of fact as to whether some smaller geographic unit is the relevant market. The district court also erred in requiring the plaintiffs to produce exact percentages showing Metro's position in the market. Our case law has never required the showing of exact percentages, especially when both sides concede that such percentages do not exist. Finally, summary judgment is inappropriate because there is a question of material fact as to the existence of market power. On the one hand, Metro claims that it does not have sufficient market power to raise any antitrust concerns. On the other hand, the plaintiffs put into evidence testimony about the dominating role of Metro on the south side of Atlanta, testimony that Metro has no effective competition on the south side, and evidence of the large number of listings and sales that have ultilized Metro. In short, there is sufficient contradictory evidence that summary judgment is inappropriate on this issue.

2. The Membership Requirements

Metro argued to the district court, and renewed its argument in this Court, that it should be awarded summary judgment because even if it has sufficient market power its membership requirements are acceptable under *Realty Multi-List*. The district court did not reach this argument because of its disposition of the market power question. Because this is a pure question of law and because this argument is properly before this Court, we turn to the question of whether the membership require-

ments are acceptable under *Realty Multi-List*. *Id.* at 1383 n. 67 (reaching the issue of whether the membership requirements were reasonable despite the need to remand the case for a determination of market power).

The *Realty Multi-List* court held that, once the plaintiffs have shown the requisite market power, the multilist service must justify its restrictive membership requirements. The court noted that the restrictive membership requirements must be evaluated in light of an existing, extensive series of state laws and regulations. The court held that it is necessary to compare the proffered justification of the membership requirements to the state laws and if the multilist service's concern which motivated the restrictive membership requirements is already covered by state real estate brokerage law then the multilist service must "make a showing either that the legitimate needs of the service require protection in excess of that provided by the state or that the state does not adequately enforce its own regulations." *Id.* at 1380. The burden of proof is on the multilist service. *Id.* at 1380-81 n. 61. In the event that the concern underlying the membership requirements is a subject not covered by the regulations or the regulations are not enforced by the state, the court held that we must evaluate the suggested justification to see if it is "reasonably necessary to the accomplishment of the legitimate goals and narrowly tailored to that end." *Id.* at 1375.

Metro proffers two main justifications for requiring its users to join the Realtors. First, Metro explains that Article 21 of the Realtor code of ethics imposes a "no soliciting" rule. Metro explains that few brokers would be willing to enter his or her client list into Metro's system without assurances that other brokers will not "steal" the list and solicit the clients directly. Metro explains that this justification is pro-competitive because the rule encourages more brokers to use the system and therefore increases the efficiencies of the market. Second,

Metro explains that Article 14 of the Realtor code of ethics requires Realtors to arbitrate all disputes. Metro explains that this also encourages brokers to use the system because most disputes are over relatively small sums of money and traditional legal remedies are not cost effective for these disputes.

We therefore must examine the Realtor membership in light of these two justifications and the *Realty Multi-List* standards. It is clear that Georgia state law does not impose any arbitration requirements in potential realtor disputes, *see generally* Ga.Code Ann. §§ 43-40-1 through 43-40-32 (1988 & Supp.1990), or any "no solicitation" rule. *Id.; cf.* Ga.Code Ann. § 43-40-25(a)(26) (Supp. 1990) (making it an unfair trade practice to knowingly solicit an exclusive listing from an owner who has already entered an exclusive listing contract with another broker.) Moreover, *Realty Multi-List* held that there is a legitimate competitive justification for a multilist system to adopt a membership rule which is designed to assure the membership of the ethics of the other members and thereby induce individuals to join the system. *Realty Multi-List*, 629 F.2d at 1375. Therefore, the question we must address is whether the realtor membership requirements are "reasonably necessary to the accomplishment of the legitimate goals and narrowly tailored to that end." *Id.* at 1375. While the goal of inducing brokers to join the multilist system is a legitimate pro-competitive justification and the "no-solicitation" and arbitration rules are both reasonable and narrowly tailored to that end, this lawsuit is not questioning the validity of those two rules. The question before this Court is whether it is necessary to impose Realtor membership requirements in order to obtain the same ends. It is clear that the Realtor membership requirements are not narrowly tailored to the goal of inducing brokers to join the multilist system. Metro could easily impose its own "no solicitation" and arbitration rules on its members. Such rules would not

constitute a group boycott and would achieve the same ends that Metro claims the Realtor membership requirements achieve.

Therefore, on remand, it is necessary to determine whether Metro has sufficient market power under *Realty Multi-List*. In the event that the district court finds that Metro has the market power, it must find that the Realtor membership requirements are an illegal group boycott.[13]

E. *The Conspiracy to Monopolize Claim*

Finally, the plaintiffs bring a conspiracy claim under section 2 of the Sherman Act. *See* 15 U.S.C.A. § 2 (1973).[14] There are three elements to a section 2 claim. The plaintiffs must prove: first, the existence of "concerted action by knowing participants," *Key Enterprises of Delaware v. Venice Hospital*, 919 F.2d 1550 (11th Cir.1990); second, a specific intent to monopolize, *id.*; and third, an overt act. *Id.*

The plaintiffs argue that the record contains evidence of this conspiracy to monopolize. The plaintiffs allege that Metro was once an independent organization, that the owner of Metro met with important individuals in the National Association of Realtors, that at this meeting the owner of Metro agreed to link with the DeKalb Realtors because such a linkage would help in its competition against First Multiple. From this evidence, the plaintiffs argue that Metro intended to conspire to monopolize the multilisting market. With this monopoly as a base, the plaintiffs argue that Metro attempted to conspire to monopolize the market for professional associations.

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[13] Of course, the Realtors are free on remand to raise other justifications for the realtor membership requirements.

[14] In their complaint, the plaintiffs also bring a conspiracy claim under section 1 of the Sherman Act. Despite the fact that section 1 claims are usually easier to prove, *see Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), the plaintiffs have abandoned their section 1 claims.

The district court assumed that the evidence of the meetings between Metro and the National Association of Realtors was sufficient evidence of the first element, the concerted action element, to survive the summary judgment motion. Metro dismisses the evidence in a one sentence assertion that it is not sufficiently credible and therefore summary judgment should issue. We reject Metro's argument as meritless. Courts do not make credibility judgments when deciding motions for summary judgment. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Moreover, the fact that participants at the meeting conceded that they agreed to link up is sufficient to establish concerted action. *See Interstate Circuit v. United States*, 306 U.S. 208, 226, 59 S.Ct. 467, 474, 83 L.Ed. 610 (1939).

Metro next argues that the district court correctly granted summary judgment on the intent to monopolize element of the claim. The record supports the defendants' assertion that the intent of the conspiracy was not anticompetitive because the purpose was to foster competition. Walter Scott, one of the early presidents of Metro, stated that he and the other members of the Metro board of directors decided to merge Metro into the DeKalb Realtors because the Metro board recognized the potential power of a multilist service within the real estate community and the Metro board was afraid that Metro would somehow be purchased by First Multiple. Scott claimed that the board was fearful because First Multiple, at that time, was an exclusive service [15] and the board feared the effect on the real estate community of an exclusive service's purchasing Metro and closing it to the vast majority of brokers. Thus, the Metro board merged itself with the Realtors in order to stay relatively open. The plaintiffs cannot point to anything in the record,

[15] Following a Department of Justice lawsuit and a consent decree, First Multiple is now an open service.

which suggests any other intent by those at the meeting, and the plaintiffs especially cannot find any anti-competitive intent by those at the meeting. Therefore, there is no material issue of fact appropriate for trial and we affirm the district court's grant of summary judgment to the defendants on this claim as a matter of law.[16]

III. CONCLUSION

We therefore AFFIRM the district court on its grant of summary judgment in favor of the defendants on the conspiracy to monopolize claim. We REVERSE the district court on its grant of summary judgment in favor of the defendants on the tying claim and the group boycott claim. We REMAND this case to the district court for further proceedings not inconsistent with this opinion.

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[16] The district court, however, applied an erroneous summary judgment standard. The district court granted summary judgment on the basis that the "plaintiffs have produced no evidence that the defendants specifically intended to . . . monopolize [the multilist market.]" The district court however made no specific finding that the defendants first came forward with any evidence suggesting that summary judgment was warranted. As we recently held, "[t]he moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.1991). The district court did not examine whether the moving party had any evidence on the issue of whether Metro had the requisite intent to monopolize. The district court simply, and incorrectly, put the plaintiffs to their burdens of proof.

Rather than return this case to the district court and waste precious judicial resources, we have consulted the briefs and reviewed the record *de novo*, and we find that while the district court utilized the wrong procedure it arrived at the right result.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:88-cv-2883-RLV

FLETCHER L. THOMPSON, d/b/a FLETCHER L. THOMPSON REALTY and EMPIRE REAL ESTATE BOARD, INC.,
Plaintiffs,

vs.

METROPOLITAN MULTI-LIST, INC., d/b/a METRO LISTING SERVICE and DEKALB BOARD OF REALTORS, INC.,
Defendants.

ORDER

[Filed Jun. 28, 1990]

This antitrust action is before the court on the parties' cross motions for summary judgment and the plaintiffs' motion to compel.[1] The plaintiffs, Fletcher Thompson Realty and Empire Real Estate Board ("Empire"), allege that Metropolitan Multi-List's ("Metro MLS") requirement that members of the multiple listing service also be members of the board of realtors violates sections

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[1] Based on the court's decision as to the defendants' Motion for Summary Judgment the plaintiffs' Motion for Partial Summary Judgment and Motion to Compel are rendered moot. Also pending is a Motion for Reconsideration of the court's previous denial of a motion to intervene; for the same reasons that motion also is now moot.

1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, the Fair Housing Act, 42 U.S.C. § 3604, and 42 U.S.C. § 3606.

Metro MLS is a real estate multiple listing service wholly owned by the co-defendant, DeKalb Board of Realtors ("DeKalb Board"). Metro MLS offers a shared information service through which its members advertise real property listings and offers of commission splits to assisting brokers. As a condition of membership in and access to its multiple listing services, Metro MLS requires real estate brokers to be members of a board of realtors. It is this membership requirement that the plaintiffs challenge.

Plaintiff Fletcher Thompson, a real estate broker, applied to participate in Metro MLS but was denied access to the service because he is not a member of his local board of realtors. He has never applied for a board of realtors membership. Plaintiff Empire is a professional organization predominantly made up of black real estate brokers and sales associates. Like a board of realtors, Empire has an arbitration process available for the resolution of disputes and a code of ethics. Together the parties argue that the requirement of membership in a board of realtors as a precondition to access to Metro MLS services restrains competition in the market for multiple listing services.

Because of the complexity of this action and the numerous arguments made, the court will consider the motions for summary judgment as they relate to each count of the amended complaint. In doing so, the court is mindful that summary judgment should be used sparingly in complex antitrust litigation where motive and intent play leading roles, *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 82 S.Ct. 486 (1962), but also recognizes that the plaintiffs carry the burden of adducing significant probative evidence of the essential elements of the asserted claims and the existence of genuine issues of fact.

COUNT I

Count I of the amended complaint alleges that Metro MLS's membership requirement is a per se violation of section 1 of the Sherman Act because it is an illegal tying arrangement. A particular restraint is considered per se illegal when the restraint is "plainly anticompetitive" and lacking of "any redeeming virtue." *See Broadcast Music, Inc. v. Columbia Broadcasting Co.*, 441 U.S. 1, 8, 99 S.Ct. 1551, 1556 (1979). A practice is plainly anticompetitive and lacking in any redeeming virtue when it denies consumers the opportunity to choose among alternative offers without offering the possibility of any efficiency-producing economic activities. *Id.*

A tying arrangement is an arrangement in which a seller agrees to sell one product, the tying product, only on the condition that the buyer also purchase a second product, the tied product. *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 12, 104 S.Ct. 1551, 1558 (1984). There are four basic elements in a tying claim: (1) two separate products, the tying and the tied product; (2) sufficient economic power in the tying market to coerce purchase of the tied product; (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and (4) anticompetitive effects in the tied market. *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 711-12 (11th Cir. 1984); *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321 (5th Cir. 1974). Tying agreements are regarded as illegal per se because "they deny competitors free access to the market for the tied product not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6, 78 S.Ct. 514, 518 (1958).

The plaintiffs allege that participation in Metro MLS, the tying product, can be attained only through the purchase of membership in a board of realtors, the tied

product. Thus, the relevant product market is the market for multiple listing services, and the relevant geographic market is that portion of the metropolitan Atlanta area in which the defendants operate. *See Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 628 (1961).

An essential element of a tying claim is a finding that the defendants possess sufficient economic power to restrain free competition. *Midwestern Waffles*, 734 F.2d at 711-12. The defendants possess such economic power if they have the ability to force a purchaser of multiple listing services to do something that he would not do in a competitive market and have some advantage—legal, physical or economic—not shared by their competitors in the multiple listing service market. *See United States Steel v. Fortner Enter., Inc.*, 429 U.S. 610, 620, 97 S.Ct. 861, 867 (1977) (Fortner II); *Tic-X-Press v. Omni Promotions Co.*, 815 F.2d 1407, 1420 (11th Cir. 1987). The plaintiffs allege that the defendants' market power is evident in the fact that the bulk of broker assisted residential real estate business on the south side of Atlanta is conducted through Metro MLS. The plaintiffs further allege that the defendants have an economic advantage over would-be competitors in that Metro MLS's services cannot be effectively duplicated because of the substantial capital outlay required and the unlikelihood of penetrating the multiple listing service market.

It is the plaintiffs' burden to demonstrate sufficient evidence from which a reasonable jury could find that the defendants possess the requisite market power, an essential element of the tying claim. The court finds, however, that the plaintiffs' evidence relating to the defendants' economic power is insufficient as a matter of law. The plaintiffs have produced no evidence of the defendants' ability to force brokers to purchase real estate board memberships other than the general allegations of one real estate broker who stated that "the bulk of

broker-assisted residential real estate business on the south side of Atlanta, by any measure, is conducted through Metro MLS." Affidavit of Sid Venable at 7. The relevant geographic market is not limited to the south side of Atlanta but encompasses the area of effective competition within which the defendants operate, *see Tampa Electric Company*, 365 U.S. 320, 81 S.Ct. 623, and there is no evidence in the record concerning the defendants' position in that market. *See Jefferson Parish Hosp.*, 466 U.S. at 26-27, 104 S.Ct. at 1566 (hospital with 30% share of patients in its market lacked sufficient economic power).

Moreover, there is a competitive multiple listing service, First Multiple Listing Service (FMLS), within the relevant market which does not require board of realtors membership. The plaintiffs have failed to produce any evidence that FMLS is not able to provide substantially the same services as Metro MLS within the relevant market.

Even assuming that the defendants possess the ability to force brokers to purchase board of realtors memberships, the plaintiffs have not demonstrated that the defendants have a cost advantage in operating a multiple listing service. In fact, the existence of FMLS, which operates within at least a portion of the same geographic market, proves that the services can be successfully duplicated and offered on competitive terms. That one real estate broker failed in his endeavor to start a competitive service does not dispute the fact that FMLS can provide substantially the same multiple listing services to its members. The plaintiffs have produced no evidence that FMLS is hindered in the operation of its business by an alleged economic advantage held by Metro MLS. Unlike cases where the unique nature of the tying product gives one party an advantage over its competitors and thus creates a disincentive for competition, *see Tic-X-Press*,

815 F.2d 1407, multiple listing services can and have been effectively duplicated. Furthermore, Empire's business decision not to provide its members multiple listing services is not evidence that the defendants, because they provide such services, have a cost advantage in providing these services.

The plaintiffs' tying claim fails on yet another ground. There is insufficient evidence in the record to support a finding that the defendants have an economic interest in the Atlanta Board or the membership fees collected by it. Because the plaintiff's principal places of business are in Fulton County, Georgia, the specific tied product the plaintiffs must purchase is membership in the Atlanta Board of Realtors. The plaintiffs contend that Metro MLS possesses the necessary financial interest in the Atlanta Board because Metro MLS is a subsidiary of and has an interest in another realtor group, the DeKalb Board. The plaintiffs also imply that Metro MLS has a financial interest in all boards of realtors because they are financially intertwined through the payment of dues to the state and national realtor associations and the benefits conferred on Metro MLS through such associations' lobbying efforts.

The court finds these arguments unpersuasive. There is no evidence that Metro MLS receives any part of the membership fees paid to the Atlanta Board or has any other economic interest in the Atlanta Board. The fact that such a relationship may exist between Metro MLS as a wholly owned subsidiary of the DeKalb Board has no effect on the court's determination of whether Metro MLS has a financial interest in the Atlanta Board. Nor do the efforts of the state and national associations to monitor and improve the industry as a whole create an economic interest in all boards of realtors. At most, these efforts provide incidental benefits to Metro MLS. Similarly, although the Atlanta Board provides arbitration services to resolve disputes among its members and, thus,

Metro MLS need not provide these services, the court finds that this is insufficient to establish the requisite financial interest in the Atlanta Board. The performance of some services, without charge, does not of itself create an economic interest in the Atlanta Board. *See generally Pullen v. Bowen*, 820 F.2d 105 (4th Cir. 1987) (radiologists' reading of x-rays without charge to hospital not evidence of economic interest).

Because the court finds insufficient evidence of the defendants' economic power in the relevant market and no evidence that Metro MLS has an economic interest in the Atlanta Board, the source of the tied product, the plaintiffs have failed to establish an essential element of their illegal tying claim. Therefore, summary judgment is GRANTED as to COUNT I.

COUNT II

The plaintiffs allege in Count II of the amended complaint that the board membership requirement is a per se violation of antitrust laws because Metro MLS is an "essential facility" which the defendants must make available to all real estate brokers and sales associates. The essential facilities doctrine provides that a monopolist's refusal to give competitors reasonable access to an essential facility is an illegal restraint of trade. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977) ("[W]here facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.").

To establish liability under the essential facilities doctrine the plaintiffs must prove four elements: (1) control of the essential facility by a monopolist; (2) a competitor's inability, practically or reasonably, to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to the competitor. *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1133 (7th Cir. 1983). The plaintiffs must provide some evi-

dence of each element in order to survive the defendants' motion for summary judgment. The court finds that the plaintiffs have not met this burden.

First, there is insufficient evidence to support a jury finding that the defendants have monopolized the market for multiple listing service privileges in the Atlanta area. A business monopolizes in violation of antitrust laws if it deliberately follows a course of conduct through which it obtains or maintains power to control price or exclude competition in the relevant market. *United States v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005 (1956). Although the plaintiffs assert generally that the defendants possess the power to exclude multiple listing service competitors, the existence of FMLS proves otherwise. FMLS operates in the same geographic market as Metro MLS, provides substantially the same services, and creates competition in the market for multiple listing services privileges. The fact that Metro MLS may be more efficient or more successful than its competitors in providing such services does not serve as evidence of monopolistic conduct.

Second, even if Metro MLS were a monopolist, the plaintiffs have presented insufficient evidence to prove that Metro MLS, as opposed to another multiple listing service, is essential to the business of real estate brokers and sales associates or that the services are incapable of being duplicated. As discussed above, the existence of FMLS clearly shows that the multiple listing services provided by Metro MLS can be reasonably duplicated. That the plaintiffs have chosen not to duplicate such services is a business decision and not the result of an illegal restraint of trade.

COUNT III

Although the court finds that the membership requirement is not a per se violation of antitrust law, the plaintiffs may still prevail by showing that the requirement,

as it actually operates in the market, unreasonably restrains competition. *See Fortner Enter. v. United States Steel*, 394 U.S. 495, 499-500, 89 S.Ct. 1252, 1256-57 (1969) (Fortner I); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) (membership criteria of multiple listing service subject to rule of reason analysis). This test, known as the "rule of reason," focuses analysis on the competitive significance of the challenged practice and requires courts to void any practice whose anticompetitive effects outweigh its contributions to competition. *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-92, 98 S.Ct. 1355, 1363-65 (1978).

In Count III the plaintiffs allege that Metro MLS's membership requirement violates the rule of reason because it is unreasonable to require membership in a board of realtors when other professional organizations, such as Empire, provide the same or substantially the same arbitration services and codes of ethics which the defendants claim justifies the exclusion of non-realtor board members. Such a limited requirement, the plaintiffs argue, is not justified by legitimate competitive goals.

The plaintiffs, however, have failed to establish an essential element of a claim under the rule of reason. The rule of reason requires a showing that Metro MLS has sufficient market power in the relevant market such that an exclusion from membership not reasonably grounded in competitive needs produces competitive harm. *See Realty Multi-List*, 629 F.2d at 1372. Only if Metro MLS possess such market power does the inquiry turn to the issue of whether the membership requirement is justified by legitimate competitive needs and whether it is narrowly tailored to that end. *Id.* at 1374-75.

In determining whether Metro MLS has sufficient market power the plaintiffs need not demonstrate that Metro MLS has a monopoly in the market for multiple listing

service participation privileges. Rather, the evidence need show only that exclusion from such privileges results in the denial of the opportunity to compete effectively on equal terms. *Id.* at 1373. As evidence of Metro MLS's market power the plaintiffs allege that the vast majority of area brokers belong to Metro MLS, the vast majority of area real estate sale parcels are listed with Metro MLS, and nearly all sales consummated in the area are of parcels listed with Metro MLS.

As discussed above, the plaintiffs have failed to establish the requisite market power in relation to the tying claim. Although the standard of market power applied to a rule of reason claim is somewhat different in that the court must determine whether the exclusion denies real estate brokers the opportunity to compete effectively, the court's findings as to the tying count also apply here.

In addition, the plaintiffs placed in the record evidence concerning the dollar volume of sales made through Metro MLS and general allegations that the vast majority of real estate business in the relevant market is conducted through Metro MLS. Conspicuously absent, however, is any affirmative evidence demonstrating what percentage of the relevant market Metro MLS's sales represent and the percentage or dollar volume of sales made by FMLS, a competitor in the same market. The plaintiffs' citation to a report which states that approximately 90% of homes sold nationally are sold through a multiple listing service in no way identifies the specific market power possessed by the defendants. Although the evidence that is in the record suggests that a substantial amount of sales are made through multiple listing services, there is insufficient evidence that the exclusion of brokers specifically from membership in Metro MLS denies them the opportunity to operate effectively on equal terms.

Because the plaintiffs failed to establish the requisite market power, summary judgment is appropriate as to Count III, and the court need not consider the actual competitive effects of Metro MLS's membership requirement.

COUNT IV

In Count IV of the amended complaint the plaintiffs allege a claim for conspiracy to monopolize in violation of section 2 of the Sherman Act. A section 2 conspiracy to monopolize claim requires proof of (1) a conspiracy; (2) a purpose to achieve monopoly power; and (3) a specific intent to injure the plaintiff and to monopolize. *Hill Aircraft & Leasing Corp. v. Fulton County*, 561 F. Supp. 667, 677 (N.D.Ga. 1982), *aff'd*, 729 F.2d 1467 (11th Cir. 1984). In addition, the plaintiff must submit proof of the relevant product and geographic markets. *Bill Beasley Farms, Inc. v. Hubbard Farms*, 695 F.2d 1341, 1343 (11th Cir. 1983).

In support of the conspiracy claim the plaintiffs rely on evidence that Metro MLS was acquired by the DeKalb Board of Realtors only after a meeting between the local participants and the National Association of Realtors and the affidavit of Mr. Walter Scott, part-owner of the independent Metro Multiple Listing Service, in which he stated that it was his belief that if DeKalb acquired Metro MLS it would have a better chance of competing with First Multiple Listing Service. The plaintiffs also point to the affidavit of Mr. Sid Venable who testified that he attempted to start a multiple listing service on the south side of metro Atlanta but has been frustrated in his attempts by the actions of the local board of realtors and Metro MLS.

Even assuming that the meeting between the National Association of Realtors and the local board raises a question as to the existence of a conspiracy, the court finds that there is insufficient evidence to establish a prima facie case of conspiracy to monopolize. The plaintiffs have produced no evidence that the defendants specifically intended to injure the plaintiffs or specifically intended to monopolize. The fact that the former owner of Metro MLS believed that Metro MLS would attract more mem-

bers if it were acquired by the DeKalb Board of Realtors is not evidence of a specific intent to monopolize. Even considered in the light most favorable to the plaintiffs such testimony serves only as evidence of an intent to compete with FMLS. *See Fortner I*, 429 U.S. at 612-13 n. 1, 97 S.Ct. at 863-64 n. 1 (increasing sales and market share without other intent to monopolize is not forbidden under the Sherman Act). Nor have the plaintiffs produced any evidence that the defendants have engaged in any conduct specifically intended to injure the plaintiffs. Even accepting as true Mr. Venable's statements that the defendants deliberately acted so as to frustrate his attempts to create an independent multiple listing service in the south metro area, Mr. Venable is not a party in this action. Therefore, any injury he may have suffered will not serve as evidence that the defendants intended to injure the plaintiffs.

Because the plaintiffs have failed to establish an essential element of the conspiracy to monopolize claim, the defendants are entitled to summary judgment.

COUNTS V, VI AND VII

In counts V and VI of the complaint the plaintiffs allege that the Metro MLS participation rules violate the Fair Housing Act because they discriminate against black real estate brokers and sales associates in the provision of services in connection with the sale or rental of a dwelling and discriminate against black sellers in the terms, conditions and privileges in the sale or rental of a dwelling. 42 U.S.C. 3604(b) (Supp. 1990). The plaintiffs further allege in Count II that the Metro MLS participation rules in effect deny membership in Metro MLS on account of race in violation of 42 U.S.C. § 3606.

Despite these allegations, the plaintiffs have produced no evidence that any board of realtors or any multiple listing service has discriminated against membership ap-

plicants based upon race. In fact, plaintiff Thompson admitted in his deposition that he had no evidence of such discrimination. The unsupported allegation that black real estate brokers' memory of racism practiced by realtors discourages them from joining a board of realtors or multiple listing service is insufficient to support a Fair Housing Violation claim. Similarly, there is no evidence in the record from which a jury could determine that the benefits of a multiple listing service are not available to black homesellers on the same terms and conditions as they are available to any other homeseller.

Based on the absence of evidence in the record and the absence of issues of material facts, the court hereby GRANTS the defendant's Motion for Summary Judgment on all counts.

SO ORDERED, this 28th day of June, 1990.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
United States District Judge

[Entered on Docket Jul. 05, 1990]

APPENDIX C

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

September 10, 1991

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case and Names of Parties

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 90-8724 Thompson v. Metro. Multi-List, Inc.
DC DKT NO.: 88-02883 1-CV

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely

/s/ Miguel J. Cortez
MIGUEL J. CORTEZ
Clerk

Reply To:

Pam Holloway
(404) 331-3836

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8724

FLETCHER L. THOMPSON d/b/a Fletcher L. Thompson Realty; EMPIRE REAL ESTATE BOARD, INC.,
Plaintiffs-Appellants,

versus

METROPOLITAN MULTI-LIST, INC., d/b/a Metro Listing Service; DEKALB BOARD OF REALTORS, INC.,
Defendants-Appellees.

WENDELL WHITE d/b/a Empire Realty Co. and E. PEARL PRESLEY d/b/a Pal Realty Co.,
Intervenors-Plaintiffs.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion July 11, 1991)

Before: JOHNSON and COX, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5) the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
United States Circuit Judge